

businesses in Integra's markets. Second, no carrier can afford to duplicate loops and transport to customers generating less than \$400 per month in revenue.

Another example: "While there may have been impairment in a number of areas in 1996 when the statute became law, such is not the case today." Qwest Initial comments, p.3. Again, for small to medium sized businesses, impairment is precisely the same today. The only thing that has changed for small to medium sized businesses is that they actually do have a choice of local service providers today. But the choices are all wire-line CLECs, not inter-modal carriers. Small to medium sized businesses have a choice precisely because carriers like Integra have access to ILEC loops and transport. Without this access, choice for the small to medium sized business market dies.

II. The 1996 Telecom Act is not the RBOC preservation Act

Qwest essentially argues that, because it has lost so many access lines since the advent of competition, unbundling should stop. It argues without legal citation that "When an ILEC has lost a substantial portion of the market to competitors, the Commission cannot require unbundling in that market." P. 40 This is a classically monopolist point of view.

In fact, the law not only does not support this view but is intended to accomplish the opposite result: the whole point of the Act is for RBOC's to lose market share. RBOC's losing market share should be celebrated as a sign that the Act is working, not as a sign of something bad happening. Nothing in the Act puts a limit on the number of competitors in the local telecom market, or favors one technology over another.

When Congress chose not to structurally separate the RBOCs, creating a wholesale entity that owned the network and a retail entity similar to a CLEC, it understood that the RBOC would have wholesale obligations even when its retail world was crumbling. Again, the purpose of the 1996 Telecom Act was for the RBOC's monopolistic retail world to crumble. It is not surprising that an RBOC has to make its network available to wire-line competitors even at a time when competitors using other types of technology are eroding the RBOC's market share. The Act makes no preference for cable, satellite, wireless, or wire-line technology. All technologies are expected and intended to be present in a given market. As the owner of the wire-line network, the RBOC should be expected to have wholesale obligations to wire-line competitors even in the face of severe retail competition. This is not unexpected or horrible; it is desirable and readily appropriate given that the RBOC's did not want to structurally separate.

An RBOC no longer wishing to own the underlying network in a given market is free to sell it.

III. This docket is about implementing very specific, existing language in the 1996 Telecom Act, not about re-writing the Act.

It is important to step back and remember that the focus of this proceeding is a specific provision in the 1996 Telecom Act. This proceeding is not about re-writing the Act or deciding what the future of inter-modal regulation should look like. This docket is about

implementing the language of the Telecom Act relating to competitive access to ILEC unbundled network elements.

Section 251(d)(2) of the Telecom Act of 1996 provides in pertinent part:

“In determining what network elements should be made available...the Commission shall consider, at a minimum, whether-

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”

This is the language this docket is intended to address and implement. It is relatively narrow and has two important elements: first, access to a network element is being requested; second, if access to the network element were denied, would the telecommunications carrier seeking the access be impaired in its ability to provide the services that it seeks to offer.

Integra has made clear that the network elements for which it is requesting access are DS-0 and DS-1 loops, and DS-1, DS-3, and dark fiber transport. So, the question is, if Integra does not have access to ILEC loops and transport, is Integra impaired in its ability to provide the services that it seeks to offer?

Integra is impaired without access to ILEC loops or transport unless one of the following conditions exist: first, if Integra could purchase the operationally identical loops and transport from non-ILEC loop and transport providers at economically comparable prices; or, second, if Integra could economically install its own loops or transport rather than lease them from the ILEC; or third, as USTA II requires, if special access loops and transport are an economically and operationally adequate substitute.

This is the scope of the analysis required in this docket and this is precisely the analysis Integra conducts in its Initial comments. Ironically, Integra and Qwest largely agree on the analytical framework. See Qwest Ex Parte Memorandum dated July 26, 2004. By providing very focused, very specific data about its network and customers, Integra also addresses Qwest's concern that CLECs are not submitting “...any meaningful data of their own on the record to permit the Commission to verify their claims of impairment.” See Response of Qwest Communications International Inc. to Emergency Request of the Association for Local Telecommunications Services, September 17, 2004.

Each of the three potential reasons for finding Integra is not impaired without access to ILEC unbundled network elements is examined in detail and refuted, using specific data and examining specific customers and routes. When specific data is examined, it is easy to conclude that Integra is impaired in its ability to provide the services that it seeks to offer without access to ILEC loops and transport.

Instead of focusing on market specifics and specific requesting telecommunications carriers, Qwest and Verizon engage in a data dump that does not address any portion of

the relevant analysis under 251(d)(2). Market penetration by cable, satellite, and wireless companies is not relevant to an analysis of impairment for the customer class served by CLEC's in Integra's geographic markets. The Act does not inquire about inter-modal carriers, focusing instead on the "ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." The data would be relevant if there was evidence that CLECs could get access to cable, satellite, and wireless loops and transport, thereby establishing a non-ILEC source. But there is no such evidence and the inter-modal data dump is not designed to address these relevant issues. Inter-modal data dumps might be useful in a re-write of the Telecom Act, or maybe in a section 10 forbearance petition, but they are of no use in this docket.

To be relevant in a 251(d)(2) analysis, data must be focused on a requesting telecommunications carrier and the network elements to which it is seeking access. This necessitates a focused, targeted, evidentiary record, not broad statements about fiber deployment and competitive activity. That is why Integra filed very specific, very focused evidence establishing its impairment under 251(d)(2). There is no evidence in the record contradicting or even addressing Integra's data.

The RBOC sponsored data dump called "UNE FACT REPORT 2004" adds nothing to the substantive analysis in this docket. It does, however, make clear that the FCC's role in opening markets to competition is far from over: It is difficult not to notice that the four largest local telephone service providers in the country are still working together to thwart competition instead of competing with each other. Eight years after the passage of the Telecom Act, BellSouth, SBC, Qwest, and Verizon are still making joint filings with the FCC instead of competing with each other. This should speak louder to the FCC than anything in the filing itself.

The joint filing contains generalized data from a smattering of different markets and technologies and attempts to create an image of so much competition that unbundling is apparently unnecessary. Integra submitted very specific, very focused data showing that CLECs serving the small to medium sized business market are impaired without access to DS-1 loops and DS-1, DS-3, and dark fiber transport. Integra's specific data accentuates the fallacy of the RBOC broad-brush data. The RBOC's must keep the data at a generalized level because specific data does not support their case. None of the data in the UNE FACT REPORT OF 2004 addresses any of that specific data, much less contradicts it.

For example, much is made in the RBOC report about cable and wireless penetration into the local telecom services market. As Integra's specific data proves, cable and wireless companies do not serve the small to medium sized business market. Further, until the Telecom Act is amended to require cable companies to make their loops available to CLECs, the presence of a cable provider in a given market is not relevant to the question of whether a CLEC is impaired without an ILEC loop under 251(d)(2). The same is true for the presence of a wireless carrier or a satellite provider. The impairment analysis of section 251(d)(2) does not ask how many inter-modal competitors are in the market; it does not excuse ILEC wire-line unbundling if the ILEC has lost a certain market share.

None of these issues are relevant to a UNE impairment analysis. The only relevant analysis is whether the requesting telecommunications carrier is impaired in its ability to offer the services it seeks to offer without access to ILEC loops and transport.

Integra's specific data also proves that wireless providers do not serve small to medium sized businesses as the local service provider. None of the comments in the report about wireless providers are relevant to Integra's impairment for loops and transport. The presence of wireless carriers in market is not relevant to a section 251(d)(2) impairment analysis because Integra does not have access to wireless loops or transport.

This generalized data only obscures the substantive issue and is not a part of analyzing whether Integra is impaired without unbundled access to loops and transport. Congress could make the presence of inter-modal carriers relevant, could decide to create cable and ILEC duopolies, could limit the number and type of competitors in a given market. But it has not done so, and this docket cannot be used to do so. Having proved impairment for loops and transport, Integra is entitled to access monopoly ILEC loops and transport without regard to the presence of inter-modal carriers.

IV. The Telecom monopoly is alive and well and living in ILEC wholesale networks.

The wire-line CLECs responsible for bringing choice to the small to medium sized business market are themselves subject to a monopolist. The only available supplier of wholesale loops and transport is the ILEC. Contrary to BOC claims in other markets, very few companies have actually provisioned any loops or transport in Integra's marketplace. Those that have provisioned loops or transport typically filed for bankruptcy or were propped up by a parent company. As has been shown, provisioning loops and transport is not an economically viable alternative for the small to medium sized business market in Integra's geographic regions.

Contrary to BOC advocacy, there is no robust wholesale market for loops and transport. ILECs are the only source of loops for Integra. This gives ILECs complete monopoly power.

This monopoly power is also why it is difficult to enter into commercial agreements, as solicited by the FCC. Commercial agreements are made when bargaining power is relatively equal. Bargaining power between CLECs and ILECs is not equal, in part because of the ILECs' monopoly power, and in part because of an ILEC perception that it will win all issues with this FCC. If the FCC really wants to facilitate commercial agreements, it must level the playing field in order to equalize the bargaining power.

V. If Broadband is the future, the future lies with wire-line CLECs.

Every facilities-based wire-line CLEC with a data network, including Integra, is a potential broadband/VOIP supplier. VOIP is largely regarded as the future of Telecom. If loops and transport are not available to wire-line CLECs, the technology of the future is impaired. If wire-line CLECs cannot get loops and transport, small to medium sized business customers will have no choice for broadband service. The ILEC will be the only broadband option because, as Integra's specific data has shown, cable providers do not

serve small to medium sized businesses. Dependence on the ILEC for broadband is anti-competitive and bad public policy.

All policy-makers should read "The Broadband Problem: Anatomy of a Market Failure and a Policy Dilemma", Charles H. Ferguson, Brookings Institution Press, Washington D.C. 2004. Unlike most Telecom industry papers and analysis, author Ferguson does not appear to have any biases for or against any Telecom players or participants. He represents neither ILECs nor CLECs. His perspective is that of an economist and technology entrepreneur, bringing a neutral observer perspective to Telecom. The author summarizes his book as follows:

Broadband technology, which is rooted in modern digital electronics and high-speed communications channels, constitutes a disruptive, supplanting technology that threatens current ILECs and CATV providers. Its rates of technical change and absolute performance levels far exceed those currently provided by monopoly incumbents. Thus it could change the telecommunications industry's economics and structure dramatically, placing serious pressure on the incumbents' business models.

Under current industry conditions, incumbent firms (and particularly the ILECs) have insufficient incentive to modernize rapidly on their own and deliver technical progress to their customers, show few signs of doing so, and are unlikely to impose effective long-term competitive discipline upon each other because they face little competitive pressure either from one another or from new entrants. Furthermore, they resist competitive discipline through huge expenditures on litigation, lobbying, and academic experts; they also treat their core services as cash cows and perform comparatively little R&D of value.

The U.S. broadband problem has already caused, and is continuing to cause, a significant drag on U.S. and world economic growth. It is also widening the so-called "digital divide," both within and between nations. In a more competitive and dynamic industry environment, the difference between services available to the wealthy and poor would be reduced, and the absolute level and affordability of information technology services available to the poor would improve greatly. Any measures that directly or indirectly make the telecommunications sectors of developing nations more open and competitive could have significant positive effects on the economic growth of less developed nations.

The current U.S. policy and regulatory regime is unable to correct these problems and in some respects perpetuates or even worsens them. In principle, the Telecommunications Act of 1996 ended the regulated monopoly regime and established the basis for a decentralized, competitive local telecommunications industry in the United States. However, there has been little visible change in the competitive or

technological environment, mainly because of flaws in the 1996 act, mistake in FCC policy, other federal policy errors, and successful ILEC resistance. Recent efforts by the FCC to permit greater media industry concentration could worsen the problem. Thus, little progress can be anticipated without major shifts in federal policy and regulatory procedures.

Ferguson, pp.29-30.

Leaving the future of Telecom technology to the ILECs is a fatal policy mistake. The future of technology belongs to the new, efficient, facilities-based entrants, who are motivated solely by pushing the technology envelope to deliver faster, better products, and are not protecting an historical, monopoly position. With AT&T exiting the consumer business and UNE-P going away, absent loops and transport for wire-line CLECs, the broadband world will once again belong to the BOCs and the cable companies.

It is critical for policy-makers to understand the distinction here: VOIP providers like Vonage can only provide VOIP services to those customers who already have broadband, typically DSL from an ILEC or a CLEC, or cable from a cable company. Vonage uses the broadband connection provided by someone else to provide a VOIP service.

Integra has its own facilities-based data network. This means that Integra can actually provide the underlying broadband service, not just the VOIP service. Integra and similarly situated CLECs ensure consumers a choice for broadband, not just a choice for VOIP. However, Integra needs loops and transport to provide the broadband service. If loops and transport are not available, Integra can not provide DSL let alone VOIP to any customer. Continuing the availability of loops and transports means consumers get significantly more choices of broadband providers and VOIP.

VI. The Transition period proposal to raise prices for enterprise loops and transport is flawed from both a legal and policy stand-point. There is no legal or factual basis for the FCC to make pricing decisions in this proceeding.

The proposal to raise prices for UNE-P and enterprise loops and transport gives CLECs a solid appellate issue. The proposal increases prices for existing customers and takes prices for new customers all the way up to special access rates. Simply stated, there is no mention of this issue, much less any factual record supporting it, in the TRO. There is no factual record supporting the need for these increases in this proceeding. There is no evidence anywhere suggesting that state Commissions have somehow failed in their pricing duties. As a legal matter, this increase is fatally flawed. As a policy matter, as explained in the loop and transport impairment analysis, moving prices to special access is devastating to Integra.

Two thoughts to consider: First, if prices for UNE-P and enterprise loops and transport are too low, why aren't the ILECs competing with one another? In other words, if there is no collusion in the Telecom marketplace, and if access can be obtained to an ILEC

network at artificially low prices, shouldn't the ILECs be invading each other's territories instead of making joint filings? Why aren't they?

Second, Integra filed an extensive analysis showing impairment for loops and transport. This filing was made necessary largely by ILEC claims that CLECs are no longer impaired without ILEC network elements because there is so much competition in the marketplace for these wholesale elements. Now, if there is so much competition out there for these wholesale elements, why would prices for these network elements be INCREASING? If there is so much competition for these wholesale elements, shouldn't prices be decreasing?

VII. Pricing for 271 network elements must be addressed in the context of the nondiscrimination provision of section 202.

The FCC should choose a pricing methodology for 271 network elements and leave the implementation to the states. The methodology chosen must ensure that Qwest and the other RBOCs not be allowed to charge CLECs more for unbundled network elements under 271 than they charge or impute to themselves. The nondiscrimination provision in 202 of the Communications Act mandates this outcome.

Under this standard, the current TELRIC-based wholesale rates are actually discriminatory under 202 in some jurisdictions because they are higher than loop costs Qwest apparently imputes to itself, assuming that Qwest is not pricing below cost. Some illustrations using DS-0 loops are helpful. Remember, Integra serves 56% of its small to medium sized businesses with DS-0 loops. Even though as a matter of rate design, most RBOCs continue to charge business customers higher retail rates than residential customers, the focus of this section is on the cost of a loop, and the cost of a DS-0 loop should not vary from a residence to a business customer. A loop is a loop is a loop. If anything, the cost of a loop should be higher for a residential customer, making the following illustrations biased in favor of the RBOCs.

Illustration: In Utah, Qwest's retail charge for a basic DS-0 line is \$11.03. See Qwest's website, "Main Residential Line" for the state of Utah; see also Qwest's Exchange and Network Services tariff on file with the Utah Public Service Commission. Integra's wholesale cost for a DS-0 loop in Utah is \$11.99 (\$11.63 for the loop plus \$.36 monthly recurring cost for channel termination). This means that Qwest's RETAIL price is LESS THAN Integra's wholesale cost for just the loop, not including any switching because Integra has its own switches. Qwest's retail price is legally required to cover all costs, including Qwest's channel termination and switching costs. Assuming Qwest charges itself the same channel termination and switching fees contained in Integra's interconnection agreement with Qwest, subtracting \$.36 (channel termination) and \$3.56 (switching) from \$11.03 leaves \$7.11, meaning Qwest's loop costs cannot be more than \$7.11 unless it is engaged in illegal below cost pricing. Integra pays \$11.63 at TELRIC just for the loop, 61% more than Qwest apparently imputes to itself. TELRIC rates for 271 elements in Utah are discriminatory and excessive under 202.

Another illustration: In Oregon, Qwest's retail rates for a basic DS-0 are listed on its website as in a range from \$12.80 to \$14.80, depending on where a person lives. See also, Qwest's Tariff No. 29 on file with the Oregon Public Utilities Commission. Integra's wholesale cost for a DS-0 loop in Oregon is \$14.90 (\$13.95 for the loop plus \$.95 for channel termination), without regard to geography. This means that Qwest's RETAIL price is LESS THAN Integra's wholesale cost for just the loop, not including any switching because Integra has its own switches. Again, assuming that Qwest imputes to itself the same channel termination and switching fees contained in Integra's interconnection agreement with Qwest, subtracting \$.95 (channel termination cost) and \$1.26 (switching cost) from \$12.80 to \$14.80 leaves \$10.59 to \$12.59, meaning Qwest's loop cost cannot be more than \$10.59 to \$12.59 unless it is engaged in illegal below cost pricing. Integra pays \$13.95 at TELRIC just for the loop, 10 to 30% more than Qwest imputes to itself. TELRIC rates for 271 network elements in Oregon are excessive and discriminatory under section 202.

Under 271, this pricing difference is against the law. Section 202 requires non-discrimination. If TELRIC pricing is discriminatory in some jurisdictions, it is easy to conclude that special access pricing is discriminatory. Recall the Verizon bills referenced in Integra's initial comments. To bring special access rates down to TELRIC rates, Verizon had to discount the bills by 80%. Raising network element prices to special access rates makes absolutely no sense when TELRIC rates are already significantly above RBOC costs.

These state-by-state differences illustrate why it is critical for the FCC to chose a pricing methodology and leave implementation to the states. They also illustrate the fallacy of RBOC claims that current wholesale prices are too low.

VII. Conclusion

Small to medium sized business customers have a choice of local telecom service provider solely because of the success of wire-line CLECs. This success is precisely the outcome envisioned by the Telecom Act. CLECs need continued access to loops and transport at TELRIC or nondiscriminatory prices to continue bringing choice to this customer class, and to bring the broadband technology that promises a strong future. Integra asks government only for a level playing field and trusts the marketplace to determine winning companies and technologies.

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Date: October 15, 2004

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